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Supreme Court, U.S.
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In The

Supreme Court of the United States

JANICE M. FLESZAR,

Petitioner,

v.

HILDA SOLIS, Secretary,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a technicality of the law in Section 806 of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, which has been the subject of much consternation and evolving interpretation should preempt the principles and protections for which that law was intended.

2. Whether public agency immunity from tort liability creates a disincentive for optimal performance that can directly or indirectly cause harm to workers and the public at large, and in so doing violates the public trust and the fundamental fairness doctrine guaranteeing under the Fifth and Fourteenth Amendments of the U.S. Constitution that the government shall not take a person's life, liberty, or property without due process.

   Consider the loss of pensions and livelihoods attributable to the Enron and Madoff scandals, and the fact that physicians, like government agents dedicated to the welfare of the people, are subject to malpractice liability as well as strict standards of professional conduct – *accountability, integrity, and transparency.* The Hippocratic Oath's prescribed "first do no harm" might reasonably apply here.

3. Whether the pursuit of justice is a right or privilege. Even though our nation has laws to protect the civil liberties and equal rights of *all of its citizens* according to the Constitution and the Bill of Rights, they are ineffectual when one cannot meaningfully access/engage with the legal system

QUESTIONS PRESENTED – Continued

and/or its agents due to a lack of "opportunity or ability".*

Consider the tenets of the First, Fifth, Sixth, and Fourteenth Amendments which provide respectively that: "Congress shall make no law . . . abridging . . . the right of people . . . to petition the government for a redress of grievances;" "No person shall . . . be deprived of life, liberty, or property, without due process of law;" "In criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense;" and " . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." With regard to the latter, is it the intention of our Constitution to favor the rights of the accused over the rights of presumed victims?

**For example, individuals disadvantaged by age, gender, limited financial and other resources, lack of counsel, legal acumen and/or political clout.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Janice M. Fleszar, respectfully petitions for a writ of certiorari in this case to review the judgement of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, App. 1. The order and decision of United States Department of Labor Administrative Review Board, App. 8. The decision and order of United States Department of Labor Office of Administrative Law Judges, App. 18. The initial decision and order of the United States Department of Labor Office of Administrative Law Judges, App. 28. The petition for review of the United States Court of Appeals for the Seventh Circuit, App. 36 (Exhibits pp. 7-236 omitted).

JURISDICTION

The United States Court of Appeals filed its decision on March 23, 2010. This Court granted an extension of time to file the petition for writ of certiorari to August 20, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Fourteenth Amendment of the United States Constitution provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

Preamble. *Petitioner is not an attorney or paralegal and has no formal legal training. She is not versed in the intricacies of the law or legal precedent. As such, the petitioner has sought to use information at her disposal to the best of her ability, hoping not to offend or embarrass this Court by her pedestrian approach. In seizing this final opportunity to be heard, she prays for tolerance and understanding in considering the merits of her case.*

After serving the American Medical Association ("AMA") for 25 years and accruing a record of well-documented and quality performance, petitioner was subjected to a host of adverse employment actions and ultimately terminated on August 22, 2007. She attempted to seek redress for the AMA's actions by filing two complaints under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002

("the Act or "SOX"), 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980.

Petitioner's grievance with AMA began in 2003 with a dispute over the denial of pension benefits 11 years after they were promised under oral contract. This action came in the wake of AMA's decision in late 2002 to freeze its defined benefit pension plan without grandfathering or paying out its older, long-term employees. Discovery in this matter gave rise to charges in 2004-2005 of alleged breach of contract and fiduciary duty, employee misclassification (related to a federal grant) and fraud involving a contract with a facsimile of petitioner's signature used by AMA's law firm to dispute petitioner's pension claims. These matters were reported to the U.S. Department of Labor's ("DOL") Employment Benefit Security Administration ("EBSA") in Chicago. While the petitioner hoped to resolve them with EBSA's help, she instead was advised to seek a private attorney.

In 2006, petitioner again informed the EBSA of several oddities regarding AMA's handling of her 401(k) pension loan involving Northern Trust and Fidelity Investments. These included: 1) a failure to comply with the terms of a 401(k) loan promissory note with regard to the initial payroll deduction; 2) a notice that her loan was in default even though payments were made by payroll withdrawal; and 3) a practice of designating a portion of petitioner's loan payments [and later 401(k) withdrawals] as "match funds." Petitioner questioned why such credits appeared on statements related to these transactions

when they should be associated with employer contributions. EBSA also received from her a seemingly relevant *Detroit News* article[1] about a DOL study on misappropriation of 401(k) pension funds and fraud. Nothing, however, materialized as a result. Petitioner later sent a letter and made several follow-up calls to the Illinois Attorney General informing her of the pension-related issues, but again no action was taken.

With the complexity and limitations of ERISA, her difficulty obtaining counsel, and pending statutes of limitation, petitioner filed two whistleblower complaints under the SOX; one (on or about September 29, 2006) alleging a downgrading of her position in retaliation for reporting fraud and other wrongdoing and the second (on or about October 22, 2007) alleging wrongful termination following initial SOX and subsequent Equal Employment Opportunity Commission ("EEOC") filings.[2]

Upon termination, AMA also attempted to coerce petitioner into signing away her legal rights, including those related to her SOX claims, in return for five

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[1] Kristof, Kathy; "Fed's discovery of 401(k) plan fraud sounds alarm for all employees to heed;" *The Detroit News;* Dec. 27, 1995.

[2] Section 1107 of H.R. 3763, codified as 18 U.S.C. § 1513(e), establishes civil and criminal violations for retaliation against employee whistleblowers. Any violation of either 18 U.S.C. § 1514A or 18 U.S.C. § 1513(e) also commits a violation of the Securities Exchange Act of 1934.

weeks of severance. This offer did not comport with AMA's policy of one week compensation per year-of-service nor did it reflect the "enhanced" benefits that were later offered to laid-off or retirement-incentivized employees. AMA further sought to deprive petitioner of nearly $90,000 of pension by initially classifying her termination as early vs. involuntary retirement calculated to age 65. Petitioner notified EBSA, and this time got results.

From 2007-2009, petitioner fervently sought the help and protection of other government agencies including the EEOC, the U.S. Securities and Exchange Commission, and the U.S. Department of Justice's ("DOJ") Civil Rights, Victim Rights, Criminal, Federal Bureau of Investigation and U.S. Attorney Divisions and even contacted the Antitrust Department's hotline. Yet at nearly every turn, she was ignored, railroaded, or tossed around like a hot potato. The need for discovery to validate her claims and a concern about looming statutes of limitation deadlines seemed inconsequential to those she contacted. Left to her own devices, she fought for justice for most part as a pro se petitioner.

Petitioner suffered defeat throughout the whistleblower process because judicial and other authorities did not consider AMA a "covered" company under the Act. She appealed continuously with support documentation including case law, authoritative testimony, and both tangible and circumstantial evidence of AMA's business relationships, alleged transgressions, and improper past dealings. Even if petitioner

was unable to debunk the rulings in her case, the discovery she presented should have compelled further research and examination. The Administrative Law Judges ("ALJs"), Administrative Review Board ("ARB"), and Appeals Court Judges, however, seemed to disagree, appearing unmoved by her arguments, pleas for an investigation, and evidence of wrongdoing.

REASONS FOR GRANTING PETITION

I. The federal courts and the U.S. Department of Labor have been divided in their interpretation of "covered" status as it pertains to employee whistleblowers of public companies under Section 806 of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002.

The scope of coverage relative to SOX whistleblower provisions is not a black-and-white issue. Section 806, on its face, applies to companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781)" and companies that are "required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." 18 U.S.C. § 1514A(a). While this statutory language would appear to present a bright-line test for whether a particular entity is covered,

case law interpreting the Act shows a broader reach and that coverage determination is fact intensive.

Morefield v. Exelon Services, Inc., 2004-SOX-00002 (ALJ Jan. 28, 2004),[3] looked at whether an employee of a non-public subsidiary of a subsidiary of a publicly traded company was protected under the whistleblower provisions. The ALJ believed, "[t]he publicly traded entity is not a free-floating apex" when its "value and performance is based, in part, on the value and performance of component entities within its organization." *Id.* at 3, and thus ruled, "*[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units* . . . In this context, *the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary*. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization." *Id.* (emphasis added).

Although some later decisions disagreed with *Morefield*, at least one federal appellate court cited *Morefield* with apparent approval. Compare *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (citing *Morefield* and commenting that "the statute can be read to embrace an agent-subsidiary's retaliation against a protected employee"), with *Rao v.*

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[3] Decisions of Administrative Law Judges are available at www.oalj.dol.gov. Federal courts have recognized that these decisions are persuasive authority. *See, e.g., Malin v. Siemens Medical Solutions Health Services*, 638 F. Supp. 2d 492, 498 n.5 (D. Md. 2008).

Daimler Chrysler Corp., No. 06-13723, 2007 WL 1424220, at *3-5 (E.D. Mich. May 14, 2007) (analyzing *Morefield*, collecting cases on the subject of subsidiary coverage under SOX, and ultimately dismissing plaintiff's complaint because defendant was not a publicly traded company and defendant's publicly traded parent was not a named defendant).

Under the explicit language of Section 806, SOX also applies to *agents* of companies with registered securities or that are required to file Securities Exchange Act reports. 18 U.S.C. § 1514A(a); *see also* 29 C.F.R. § 1980.101 (defining "Company representative" to include "any officer, employee, contractor, subcontractor, or agent of a company"). The Act does not define "agent" or indicate that an "agent" must be a public company to be covered.

The ARB has indicated that a non-public company can be covered under Section 806 by virtue of its agency relationship with a public parent, and that the existence of such a relationship "should be determined according to principles of the general common law of agency." *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149, at 14 (ARB May 31, 2006).[4] *See also Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (collecting cases on the "proper application of

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[4] Administrative Review Board decisions are available at http://www.dol.gov/arb/.

the 'agency' provision to companies that have acted as agents of publicly traded companies with respect to their employment relationships").

Further, employees of private subsidiaries can be protected by SOX if the subsidiary was an alter-ego of the public parent. For instance, in *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-00027 (ALJ Apr. 30, 2004), the complainant was employed by a private subsidiary of a public company. She brought a whistleblower complaint against the public parent, and the ALJ concluded "that the existence of separate corporate identities does not insulate the respondent from liability." *Id.* at 20. The private subsidiary and public parent had a "great degree of commonality" of senior management, used their logos and names interchangeably, and had a common benefits plan. *Id.* All considered, the ALJ concluded, the public parent was the "alter ego" of the private subsidiary that employed the complainant. *Id.* at 21.

Other cases have referred to such a theory as "piercing the corporate veil" between private employer and public parent company. *See, e.g., Dawkins v. Shell Chemical, L.P.*, 2005-SOX-41, at 4 (ALJ May 16, 2005) (recognizing viability of veil piercing theory in the SOX context and stating that complainant must "allege facts to show sufficient commonality of management and purpose between the subsidiary/employer and its parent to justify piercing the corporate veil and holding the parent company liable for its subsidiary's actions").

A landmark decision was recently reached in *Kalkunte v. DVI Financial Services, Inc.*, in which the ARB affirmed the ALJ's position that "*a company cannot escape liability for violating the whistleblower provisions of SOX merely because it is not registered under the SEC or required to file reports under the same act.*" Here a private company was held liable for retaliation and ordered to pay damages. This decision came down on February 27, 2009, a month earlier than in *Fleszar v. American Medical Association*, ARB Case Nos. 07-091, 08-061 (ARB Mar. 31, 2009). The petitioner notes that this case was not discussed by the Court of Appeals (App. 1) although it was discussed in its Petition for Review (App. 36).

Also to be considered is an order issued on April 15, 2010, by the ARB regarding *Johnson v. Siemens Building Technologies, Inc.*, ARB No. 08-032, 2005-SOX-15, requesting *amici curiae* briefs on the issue of whether an employee of a non-public subsidiary of a publicly traded company may bring an action against the subsidiary under Section 806 of the SOX.

The following are specific questions posed by the ARB:

> 1. Is a subsidiary categorically covered under section 806 (*e.g.*, *Morefield*)? If so, does the level of ownership of the subsidiary play a factor in that coverage?
>
> 2. Under SOX's whistleblower protection provision, must a non-publicly held subsidiary respondent be an agent of a publicly held

company? What are the factors under a section 806 agency test?

3. Is the integrated enterprise test applicable to section 806? If so, should the [ARB] consider the "centralized control of labor relations" the most appropriate factor?

4. Is there any other theory under which you contend that subsidiaries would be covered under section 806? If so, explain.

II. This case provides an important opportunity for the Court to elucidate the potential for further victimization of individuals when arbiters of justice in both the workplace and government ignore evidence of wrongdoing due to a conflict of interest and/or antitrust-like endeavors.

Petitioner respectfully calls this Court's attention to the issues outlined in her petition for review (App. 36). A comparison of it with the Court of Appeals' decision (App. 1) makes readily apparent how the system failed the petitioner in her quest for justice.

Throughout her SOX proceedings, petitioner submitted considerable information/evidence to both judicial and agency officials relevant to AMA's status as a covered company and issues pertaining to her pension, fraud, and retaliation. Remarkably, none of this information was discussed or appears to have been researched/investigated (as requested) with the care, vigor and authority afforded ALJs. As concerns

about negligence and prejudice grew, she implored the ARB to consider her briefs and exhibits in their entirety, invoking the authority of the ALJ under 5 U.S.C. § 3105. This authority includes all power necessary and appropriate to conduct a fair, full, and impartial proceeding that:

- Rules upon offers of proof and receives relevant evidence;
- Provides for discovery, including the issuance of subpoenas authorized by section 8(b) of the Act and 5 U.S.C. §§ 555(d) and 556(c)(2), and determines the scope of the discovery;
- Takes official notice of material facts not appearing in the evidence in the record in accordance with 1955.40(c); and
- Takes appropriate action authorized by the Act, the implementing regulations, or the Administrative Procedure Act, 5 U.S.C. §§ 554-557 (APA) and on any procedural question not otherwise regulated by this part, the Act, or the APA, the ALJ shall be guided to the extent practicable by the pertinent provisions of the Federal Rules of Civil Procedure.

Petitioner further requested the ARB consider the following:

1. The proof and relevance of AMA's ownership of securities; function as an open-end, diversified investment company and involvement in public-private partnerships related to "covered" status under the Act. More specifically, the U.S. Securities and Exchange

Commission ("SEC") filings and complainant-cited case law relevant to AMA's relationship with Oppenheimer and other public companies including Fidelity Investments and Northern Trust Company, which have been involved with or influential in the management of AMA's Pension and 401(k) Plans;

2. The unethical, illegal and criminal aspects of petitioner's complaint involving pension benefits, wage and tax, treatment as an employee (i.e., retaliation, harassment), fraud, and discrimination having been wrongfully discharged after filing her initial whistleblower complaint;

3. The relevance and applicability of evidence to SOX and other laws under the jurisdiction of the DOL;

4. All appropriate recommendations and actions to address the many injustices put forth before the ARB, and the DOL in general, notwithstanding fiduciary conduct, questionable accounting and labor practices, and conflicts of interest that have affected employees as pension plan participants/ shareholders.

5. All new evidence/information and correspondence to two key financial groups – Fidelity Investments and OppenheimerFunds, Inc. – from the SEC last year requesting further guidance regarding the implementation

of FASB interpretation of No. 48, "Accounting for Uncertainty in Income Taxes." Specifically, they requested clarification on net asset value in respect of a tax liability when it has been the administrative practice of the fund's advisor or another relevant part to pay or reimburse the fund for errors the advisor or other party has made." This was thought to be significant with regard to questionable accounting/business practices involving the AMA and both Fidelity and Oppenheimer. Petitioner was advised by an ARB attorney that the communication was inadmissible having not been presented to the Chief ALJ for consideration, even though it was *one of many public and other information resources (documents/databases) readily accessible to the DOL and other government agencies in launching investigations, rendering legal opinions, and/or enforcing the law*; and

6. The appointment of an attorney for the petitioner given her inability to obtain/afford competent legal counsel. She feared that her lack of legal acumen and knowledge of the court system could severely compromise the *proceedings*. As a matter of civil rights, petitioner believed she should be afforded legal representation by a qualified, government-appointed attorney. Again, failure by the government/legal system to provide such assistance, she contended, further victimized a victim of crime and other illegal acts, whereas accused criminals were provided with public defenders.

By failing to heed her repeated requests for an investigation into AMA's covered status prior to dismissing her case, petitioner believes the ARB committed reversible error.

III. This case commands the Court's attention for its illumination of system weaknesses and failures that not only compromise the civil rights, due process and equal protection provisions of the Constitution, but the integrity of our legal system when laws are not equitably upheld and/or enforced by those with the power and privilege to protect the public.

While the petitioner desired to expound on the statement provided above, she did not have the time or resources to develop a more thoughtful and effective response without risk of missing her filing deadline. Nevertheless, she asks that the following be considered as valid and important reasons why this Court should grant her writ of certiorari.

- The lack of cooperation, integrity, and accountability by various departments and agencies in effecting the investigative, discovery, and deliberative processes of petitioner's proceedings not only obstructed her efforts to obtain justice and

serve the public good, but infringed on her civil and due process rights.[5]

- DOL-ARB's violation of the 180-day regulatory timeframe for rendering a decision.[6]
- EEOC's failure to comply with the "Federal EEO Complaint Processing Procedures" regarding the 180-day period to handle complaints and requests to amend complaints as well as failure to heed petitioner's plea for intervention due to health concerns before her termination.
- DOJ's proclaimed lack of authority regarding whistleblower complaints.[7]
- The failure to address retaliation and fraud in petitioner's SOX-related judicial decisions (App. 1, App. 8, App. 18, App. 28).

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[5] See response to pension issues regarding denial of claims having exceeded the statutes of limitation: Memorandum Opinion and Order (Mar. 11, 2010), District Court for the Northern District of Illinois, Eastern Division, Case No. 09CV 2247.

[6] Regulations (Standards – 29 C.F.R.), Decision and orders of the Administrative Review Board – 1980.110(c).

[7] Section 3(b) of SOX provides for a broad grant of jurisdictional authority for the SEC and/or the **Department of Justice** to enforce (civilly or criminally) all of the requirements contained in the SOX, including the four whistleblower-related provisions.

CONCLUSION

Petitioner's experience has been perplexing considering the government's legal and regulatory responsibilities and current efforts to: 1) encourage and protect whistleblowers, 2) stop fraud by financial and other institutions, and 3) investigate the business activities/practices of public companies and tax-exempt non-profit organizations – all of which pertain to petitioner's case. It also raises red flags regarding conflict of interest,[8] antitrust activity, pension security and management,[9] and the disparate treatment of certain victims and perpetrators of crime.[10]

The pursuit of this case and the sharing of petitioner's struggle is not for her benefit alone. It's for all hardworking Americans, especially women and those nearing retirement age, who become targets of unscrupulous employers willing to pilfer from and punish some of their most vulnerable workers to fund

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[8] AMA's longstanding alliances with the federal government involving contracts, grants and lobbying activities [i.e., health care reform, the electronic medical information network, and Current Procedural Technology codes (CPT®), which are used for Medicare and Medicaid reimbursement].

[9] Mamorsky, J.D.; Greenberg Traurig, LLP; "Is Today's Pension Plan Environment Cause for Concern?", *CEO (thechiefexecutive.com)*; Aug. 7, 2006.

[10] Johnson, Kirk A.; "Federal Court Processing of Corporate, White Collar, and Common Crime Economic Offenders over the Past Three Decades," Washburn University; *Mid-American Review of Sociology*; 1986; pp. 25-44.

executive salaries/bonuses, travel, campaigns, etc. and/or justify other improper action. This may occur through: 1) job duty reduction and reclassification to limit wage increases and stifle promotion of long-term, older employees, 2) undetected pension fund tampering in the absence of annual valuations, information about changes in the law, and independent oversight; 3) refusal to grandfather older employees when freezing pensions,[11] [12] 4) uneven policy enforcement, and 5) "set-up to fail" schemes to promote termination without having to pay severance or other benefits.

Workers often feel defenseless in these situations – fearing dissent could cost them their job, income and future security. Others lack the time, capital, and stamina needed to wage a legal battle knowing that their employer's resources, legal muscle, and political clout could crush any opposition. Then there are those like the petitioner who muster the strength to confront the wrongdoing and risk the hardship, because they believe in the protections of the law and the individuals who enforce them, only to find themselves still left "out in the cold."

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[11] Block, Sandra; "Protect Yourself from Pension Freezes"; *Your Money, usatoday.com*; Dec. 13, 2005.

[12] Nicholson, Trish; "New Pension Rules: Do They Cut It?"; *AARP Bulletin*, March 2004; p. 12.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 09-2423

JANICE M. FLESZAR,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review of a Decision of the
Administrative Review Board
Nos. 07-091 & 08-061

ARGUED FEBRUARY 12, 2010 – DECIDED MARCH 23, 2010

Before EASTERBROOK, *Chief Judge*, HAMILTON, *Circuit Judge*, and SPRINGMANN, *District Judge*.[†]

EASTERBROOK, Chief Judge. The American Medical Association fired Janice Fleszar, who complained to the Department of Labor that the discharge violated § 806 of the Sarbanes-Oxley Act, a whistleblower-protection provision. This law applies to a "company

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[†] Of the Northern District of Indiana, sitting by designation.

with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or . . . required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))". 18 U.S.C. § 1514A(a). The Department declined to investigate Fleszar's allegations, concluding that the AMA, a nonprofit membership association that does not issue stock, is not covered. *See* 29 C.F.R. § 1980.104(b). An administrative law judge agreed, as did the Administrative Review Board, which made the agency's final decision.

Fleszar does not contend in this court that the AMA has "a class of securities registered under" § 12 of the 1934 Act. Section 15(d) provides that the SEC may require any "issuer" of securities that has registered them under the 1934 Act to file periodic reports for investors' information. Because the AMA does not have any outstanding traded securities, it is not an "issuer," and it is correspondingly difficult to see how § 15(d) could apply.

Instead of arguing that the record demonstrates that the AMA is covered, Fleszar contends that the ALJ should have ordered the Secretary to conduct an investigation – one that Fleszar hopes might turn up a connection between the AMA and an issuer that would make § 1514A applicable. The Association formerly had an affiliated broker-dealer (AMA Investment Advisers), through which it offered mutual funds to its employees and members for their retirement plans. The AMA told the Department that it divested this affiliate during the 1990s and that,

since 2002, it has not filed, or been required to file, any reports with the SEC – and that the reports it used to file were required by ERISA rather than the Securities Exchange Act of 1934. Fleszar believes that there is a possibility that more evidence might show that the AMA remains obliged to file reports (though under what statute or regulation Fleszar does not say). And § 1514A(a) provides that its whistleblower-protection rules apply to any "contractor, subcontractor, or agent" of an entity that has stock covered by § 12 or must file reports under § 15(d). Fleszar believes that an investigation by a team of bloodhounds at the Department of Labor might turn up facts showing that the AMA is such a "contractor, subcontractor, or agent".

There is some question whether Fleszar's complaints to the Department (she filed two), and her administrative appeals, were timely. We need not decide whether she acted with the required dispatch, however, because the Department does not ask us to dismiss the petitions on account of any problems in the administrative process. Belated administrative filings are not a jurisdictional defect. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The Supreme Court distinguishes between mandatory case-processing rules and true jurisdictional requirements. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, No. 08-103 (U.S. Mar. 2, 2010) (collecting authority). Rules of administrative procedure are in the former category. *See Union*

Pacific R.R. v. Brotherhood of Locomotive Engineers, 130 S. Ct. 584 (2009).

That is as far as Fleszar gets, however. She was the applicant in the administrative process, so she bore the burdens of production and persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); *Harp v. Charter Communications, Inc.*, 558 F.3d 722 (7th Cir. 2009); *Allen v. Administrative Review Board*, 514 F.3d 468, 475-76 (5th Cir. 2008). She did not satisfy either burden. Her proposal to transfer those burdens to the Secretary not only is incompatible with the Administrative Procedure Act but also neglects the vital point that the Secretary's decision whether to investigate and prosecute is not subject to review by an administrative law judge. 29 C.F.R. § 1980.109(a). Nor is it open to judicial review. Prosecutorial decisions are committed to agency discretion. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821 (1985). (This aspect of the APA applies to whistle-blower claims through a chain of references. *See* 18 U.S.C. § 1514A(b)(2)(C), incorporating 49 U.S.C. § 42121(b), which in turn incorporates Chapter 7 of the APA.)

Fleszar believes that it would improve enforcement of the Sarbanes-Oxley Act if the Secretary were more aggressive in nosing out violations. But courts are not in the business of inventing procedures that agencies must follow; it is enough to enforce the statutes and regulations on the books. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). An agency

must be allowed the authority to decide where its investigative and prosecutorial resources are best applied. Judges do not know what is on the agency's menu and so cannot displace the agency's choices among projects. What sense would it make to direct the Department to investigate the AMA, which almost certainly is not covered by § 1514A? That would just reduce the resources available to investigate and vindicate claims by employees of publicly traded companies, the statute's main objects.

We don't share Fleszar's belief that the phrase "contractor, subcontractor, or agent" means anyone who has *any* contract with an issuer of securities. Nothing in § 1514A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by § 1514A. In context, "contractor, subcontractor, or agent" sounds like a reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air"). But whether or not this is the right way to understand "contractor, subcontractor, or agent", Fleszar did not produce evidence that the AMA fits this category, and the Secretary was not legally obliged to assist her.

Fleszar's reply brief contends that, if the Secretary did not have to pitch in, the ALJ should have lent aid by advising her how to conduct discovery more effectively. She did not make such a request of

the ALJ, however, or contend on appeal to the Administrative Review Board that the ALJ erred in this respect. Nor did Fleszar make such an argument in her opening brief in this court. Accordingly, we need not consider whether – and, if so, when – an ALJ should depart from the role of a neutral arbiter and act as a complainant's legal adviser. *Cf. McNeil v. United States*, 508 U.S. 106, 113 (1993). Statutes or regulations create an obligation to assist *pro se* claimants in some situations when entitlement to federal benefits is at issue (e.g., Social Security disability proceedings, *see Nelms v. Astrue*, 553 F.3d 1093, 1098 (7th Cir. 2009)); such an obligation is less common when the agency is adjudicating a dispute between private persons (here, Fleszar versus the AMA). But this is an issue for another day.

The petition for review is denied.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

Everett McKinley Dirksen
United States Courthouse
Room 2722 – 219 S.
Dearborn Street
Chicago, Illinois 60604

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FINAL JUDGMENT

March 23, 2010

BEFORE: FRANK H. EASTERBROOK, *Chief Judge*
DAVID F. HAMILTON, *Circuit Judge*
THERESA L. SPRINGMANN, *District Judge**

No.: 09-2423	JANICE M. FLESZAR, Petitioner v. UNITED STATES DEPARTMENT OF LABOR, Respondent

Originating Case Information:
Agency Case Nos: 07-091 & 08-061 Occupational Safety & Health Administration

The petition for review is **DENIED**, with costs, in accordance with the decision of this court entered on this date.

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* Of the Northern District of Indiana, sitting by designation.

U.S. Department of Labor [SEAL]

Administrative Review Board
200 Constitution Avenue, NW
Washington, D. C. 20210

In the Matter of:

JANICE FLESZAR,

COMPLAINANT,

v.

AMERICAN MEDICAL ASSOCIATION,

RESPONDENT.

ARB CASE NOS.
07-091
08-061

ALJ CASE NOS.
2007-SOX-030
2008-SOX-016

DATE: March 31, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Janice Fleszar, *pro se*, Chicago, Illinois

For the Respondent:
Scott E. Gross, Esq., *Sidley Austin LLP*, Chicago, Illinois

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

These appeals arise from complaints Janice Fleszar filed against her employer, the American

Medical Association (AMA). Fleszar alleged that the AMA violated the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2006), when it denied her employee benefits and then terminated her. In separate recommended decisions, Administrative Law Judges (ALJs) dismissed Fleszar's complaints on the ground that the AMA is not a publicly traded company subject to the whistleblower protection provisions of the SOX. For reasons we now explain, we affirm.

Background And Procedural History

On September 29, 2006, Fleszar wrote the Administrator of the AMA Retirement and Savings Plan complaining that she lost benefits and that the AMA retaliated against her when she began reporting "possible illegal practices" under the federal Employee Retirement Income Security Act (ERISA) and the Family and Medical Leave Act. She sent a copy of the letter to the Benefits Advisor for the United States Department of Labor (DOL), Benefits and Security Administration. The DOL construed the letter as a complaint under the whistleblower provisions of the SOX. On January 22, 2007, a DOL Regional Administrator dismissed the complaint based on the regional investigator's determination that the AMA was not a publicly held company

subject to the SOX. On February 26, 2007, Fleszar requested a hearing before an ALJ.

On April 17, 2007, the ALJ ordered the parties to show cause why Fleszar's complaint should not be dismissed because the AMA was not subject to the SOX whistleblower protection provision. Following the parties' submissions, the ALJ determined that the AMA was a private organization that did not issue or register securities, and as such it was not subject to the whistleblower protection provisions of the SOX. June 13, 2007 Initial Decision and Order – Dismissal of Complaint (*Fleszar I*) at 3. Fleszar filed a timely appeal to this Board.

Then, on October 22, 2007, Fleszar filed a second complaint with the DOL against the AMA, this time alleging that the AMA wrongfully terminated her employment after she filed her first complaint. In a December 4, 2007 determination letter, the Occupational Safety and Health Administration (OSHA) informed Fleszar that her complaint would be dismissed; the AMA was not an employer and she was not an employee under Section 806, the SOX whistleblower protection provision. Accordingly, OSHA lacked jurisdiction under the Act and dismissed Fleszar's complaint. Fleszar objected to OSHA's findings on January 8, 2008, and her second complaint was referred to another ALJ.[1]

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[1] The AMA initially argued before the ALJ that Fleszar's request for a hearing was untimely. Response to Order to Show

(Continued on following page)

On January 22, 2008, the second ALJ also ordered the parties to show cause whether he should dismiss Fleszar's second complaint because the AMA is not subject to Section 806 of the SOX. Following review of the parties' submissions, he, too, concluded that the AMA was a non-profit, non-publicly-traded company; it neither issued nor registered securities under the relevant provision of the Act, and no claim could be brought against it under Section 806. March 4, 2008 Decision and Order Dismissing the Complaint (*Fleszar II*) at 4. Fleszar then filed a second timely appeal to this Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a). Because of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, we consolidate Fleszar's appeals for the purpose of review and decision. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos., 2006-SOX-037, -108, 2007-SOX-055 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, -115,

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Cause (*Fleszar II*) at 3. The AMA has not briefed that issue to the ARB, and we deem it to have been abandoned.

ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006).

We review a grant of summary decision de novo, i.e., under the same standard that ALJs employ. Derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (2008). Because the ALJs' rulings on the show cause orders are in the nature of summary decisions, we review them de novo.

Discussion

Section 806 of the SOX, entitled "Whistleblower Protection For Employees Of Publicly Traded Companies," prohibits a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company" from discharging, demoting, suspending, or in any other manner discriminating against an employee in the terms and conditions of employment because that employee engaged in protected activity under Section 806. 18 U.S.C.A. § 1514A(a). Protected activity includes providing

information or assisting in an investigation regarding activity the employee reasonably believed constituted listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a)(1)-(2).

To prevail on the merits of a Section 806 case, a covered employee must prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the covered employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See, e.g., Kalkunte v. DVI Fin. Servs., Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-056, slip op. at 8-9 (ARB Feb. 27, 2009). If the complainant establishes by a preponderance of the evidence that her protected activity was a contributing factor in the adverse action, then the respondent can only avoid liability by providing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Id.*

Thus, as a threshold matter, to avail herself of the SOX whistleblower protection provision, Fleszar must demonstrate that the AMA is a covered employer. In both of these consolidated cases, the AMA filed affidavits describing its corporate status. The AMA avers that it is a not-for-profit corporation organized and existing under the Illinois Not for Profit Corporation Act. Declaration of Michael Katsuyama, dated February 8, 2008. The AMA is exempt from federal

income taxes because it is a not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). *Id.* The AMA has not issued any securities that are registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781 (SEA). *Id.* The AMA is not required to file and has not filed any reports under Section 15(d) of the SEA, 15 U.S.C. 78o(d). *Id.* Although the AMA has filed documents or reports with the Securities and Exchange Commission (SEC), the last occasion on which the AMA filed any documents with the SEC was in 2002. *Id.*

Confronted with this evidence, Fleszar created a murky pond of material, much related to the putative merits of her claim, and asked the ALJs and now asks us to fish for her legal theory on SOX coverage. We have pulled out her arguments relevant to that question and examine them in turn.

First, Fleszar asserts that Section 806 covers the AMA because the AMA has submitted documents to the SEC. While the AMA may have made SEC filings relating to its retirement plan, employer liability under Section 806 is limited to companies that issue securities that are registered under Section 12 or that file reports under Section 15(d), and their officers, employees, contractors, subcontractors, or agents. 18 U.S.C.A. § 1514A(a); 29 C.F.R. § 1801.102. *See Flake v. New World Pasta Co.*, ARB NO. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004), *aff'd, Flake v. U.S. Dept of Labor*, 248 Fed. Appx. 287 (3d. Cir. 2007); *see also Paz v. Mary's Ctr. for Maternal & Child Care*,

ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007) (non-profit organization is not subject to the SOX whistleblower protection provision). Because it is uncontroverted that the AMA is a not-for-profit company that does not issue securities that are registered under Section 12 or file reports under Section 15(d), it is not subject to the whistleblower protection provision of the SOX.

Next, Fleszar proposes that the AMA is a proper respondent because it does business with publicly held companies, holds government contracts, and owns real estate. We agree with the AMA's arguments and the ALJs' conclusions that a not-for-profit organization's engaging in commercial transactions does not convert it into a proper respondent for SOX whistleblower purposes. We concur in the ALJ's conclusions in *Fleszar I*:

> [T]he AMA's contractual relationships with publicly traded companies, standing alone, are insufficient to make the Respondent a covered employer under the whistleblower protection provisions. . . . Likewise, the Respondent's contractual relationships with governmental entities do not subject the AMA to § 806 prohibitions. . . . Finally, I find no basis for holding the AMA subject to § 806 provision [sic] due to real estate transaction or mutual fund activities.

Fleszar I, slip op at 3; *see also Fleszar II*, slip op. at 4.

Finally, and more specifically, Fleszar charges that ownership of "AMA Investment Advisors," which

in turn had an affiliation with "Oppenheimer Capital," establishes SOX coverage. AMA's submission represents the following:

> "AMA Investment Advisors" was an entity that the AMA sold to Oppenheimer Capital in the 1990s. Before that sale, AMA Investment Advisors provided investment advice to AMA members, it did not issue any securities registered under SEA § 12, and it was not required to file any reports under SEA § 15(d). The AMA is not a partner in, or subsidiary of, Oppenheimer Capital, and the AMA does not own or control whatever entity remains of the former AMA Investment Advisors.

Declaration of Michael Katsuyama, dated February 8, 2008. Although Fleszar's contentions are unclear, she does not directly contradict AMA's factual averments. We conclude that: AMA Investment Advisors probably would not have been deemed a proper respondent under Section 806, but that is not dispositive because it ceased to be under the direction or control of the AMA prior to the enactment of the SOX; and a was never Fleszar's employer. Under those facts, the AMA is not subject to liability in these matters.

CONCLUSION

Fleszar has failed to demonstrate that the AMA is a covered employer subject to the whistleblower protection provision of the SOX. Accordingly, we

ACCEPT the ALJs' recommended decisions and orders and **DISMISS** Fleszar's complaints.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
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Issue Date: 04 March 2008

Case No.: 2008-SOX-00016

In the Matter of

JANICE FLESZAR,
Complainant,

v.

AMERICAN MEDICAL ASSOCIATION,
Respondent.

Appearances: Janice Fleszar
Pro Se Complainant

James S. Whitehead, Esquire
For the Respondent

Before: John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises out of a complaint filed by Janice Fleszar ("Complainant") against American Medical Association ("Respondent" or "AMA") under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley

Act of 2002, 18 U.S.C.A. § 1514A ("SOX" or the "Act"). Based on my review of the record, I issued an Order to Show Cause on January 22, 2008, on whether the complaint should be dismissed for failure to state a cause of action because the Respondent is not subject to SOX. Both parties have responded to the Order to Show Cause. This threshold question of whether the Respondent is subject to Section 806 of SOX must be resolved before any consideration of the merits of the case may be considered.

PROCEDURAL HISTORY

The Complainant filed a previous complaint against the Respondent which was dismissed by Judge Stansell-Gamm on June 13, 2007, on the basis that the AMA is not subject to the provisions of Section 806 of the Act. *Fleszar v. American Medical Association,* OALJ No. 2007-SOX-00030 (June 13, 2007). That matter is currently on appeal to the Administrative Review Board as case number ARB No. 07-091.

On October 22, 2007, the Complainant filed the present complaint against the AMA alleging that her employment has been wrongfully terminated since the first complaint was filed. A final determination letter was issued by Occupational Safety and Health Administration ("OSHA") on December 4, 2007. In the Secretary's Findings, OSHA determined that the Respondent is not a company within the meaning of the Act because it does not have a class of securities

registered under Section 12 of the Securities Exchange Act of 1934 and is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Additionally, OSHA determined that the Complainant is not an employee covered under the Act because she was not an employee of a company subject to SOX. Consequently, OSHA determined that it lacks jurisdiction to conduct an investigation and dismissed the complaint.

The Complainant submitted her objections to the Secretary's Findings on January 8, 2008. In the objections, the Complainant provided her explanation of the jurisdictional basis for her claim – including emails and a "Response to Notice of Appeal And/Or Order Establishing Briefing Schedule" submitted to the Administrative Review Board on January 4, 2008, in conjunction with the previous complaint currently on appeal. After a review of the record, I ordered the parties to brief the issue of whether the Respondent is a company subject to the applicable SOX provisions.

Arguments of the Parties

Complainant's Argument

The Complainant makes several arguments that the Respondent is subject to the whistleblower provisions of SOX. Her first argument is that the AMA has a class of registered securities under Section 12 of the Security and Exchange Act of 1934 ("SEA") and is required to file reports under Section 15(d).

Complainant's Brief at 10. The Complainant provides no proof of that and admits that she cannot locate or produce AMA-certified shareholder reports. *Id.*

The Complainant also argues that the AMA has entered into arrangements with publicly-traded companies such as Oppenheimer Capital and investment advisors and, thus, should be treated as a publicly traded company. *Complainant's Brief* at 11-16. Complainant suggests that Oppenheimer Capital is connected to the Respondent through a transaction involving AMA Investment Advisors. *Id.* at 12-14. The Complainant then implies that the AMA is actually a subsidiary of Oppenheimer and is "insulat[ing] itself from exposure to the Act through unique business arrangements." *Id.* at 15. The Complainant states that she believes the AMA has acted on behalf of a publicly-traded company "at least in its relationship with Oppenheimer and perhaps others with whom [the AMA] has partnered and profited." The Complainant attached multiple documents, most of which concern the merits of her complaint rather than the question at hand. *Id.* at Exhibits A-O. The remaining exhibits are a variety of documents concerning Oppenheimer Capital and AMA Investment Advisors, among others, and do not indicate that the Respondent is a publicly-traded company.

Respondent's Argument

The Respondent argues that Judge Stansell-Gamm correctly concluded in the previous case that

the AMA is not subject to the whistleblower provision of SOX. *Respondent's Brief* at 1. To support this argument, the Respondent notes that the AMA is not subject to SOX Section 806 because it is a not-for-profit corporation under the Illinois Not For Profit Corporation Act and is exempt from federal income taxes as a not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). *Id.* at 4. The Respondent notes that it has issued no securities registered under SEA Section 12 and is not required to file reports under SEA Section 15(d). *Id.* The Respondent argues that, as such, the AMA is not subject to the whistleblower protection provisions of Section 806 of SOX and the filing of any other type of document or report with the SEC does not trigger SOX coverage. *Id.*

The Respondent then addresses the Complainant's exhibits and allegations about the AMA's relationships with other entities. The Respondent notes that AMA Investment Advisors, which did not issue registered securities and was not required to file SEA Section 15(d) reports, provided investment advice to the AMA until the AMA sold it to Oppenheimer Capital in the 1990s – long before SOX Section 806 went into effect. *Respondent's Brief* at 5. The Respondent notes that the AMA is not a partner in, or subsidiary of, Oppenheimer, has no ownership or control of AMA Investment Advisors, and should not be subject to the SOX whistleblower provisions because of contracting or doing business with publicly traded companies. *Id.* at 6. The Respondent concludes

by stating that the Complainant's arguments regarding the AMA's relationships with other companies "amount to nothing more than rampant speculation without factual basis" and "[s]uch unsupported conjecture simply does not establish that the AMA was acting on behalf of a publicly traded company when it took the actions alleged in this case." *Id.* at 7.

In support of its argument, the Respondent offers the Declaration of Michael Katsuyama, Division Counsel for the AMA. *Respondent's Brief* at Exhibit B. Mr. Katsuyama stated that the AMA is a not-for-profit corporation, is exempt from federal income tax, has not issued any securities that are registered under Section 12 of the SEA, and is not required to file any reports under Section 15(d) of the SEA. *Id.* Mr. Katsuyama also stated

> [t]o the extent that the AMA has filed any documents or reports with the SEC, no such filing was ever made pursuant to Section 15(d) of the SEA. The last occasion on which the AMA filed any documents with the SEC was in 2002, and such documents were not filed pursuant to Section 15(d) of the SEA.

Id. Mr. Katsuyama noted that AMA Investment Advisors was an entity that the AMA sold to Oppenheimer Capital in the 1990s and that AMA Investment Advisors did not issue any securities registered under SEA Section 12 and was not required to file any reports under SEA Section 15(d). Mr. Katsuyama concluded by stating that the AMA no longer has an affiliation with AMA Investment Advisors, is not a

partner in or subsidiary of Oppenheimer Capital, and has no affiliation with the other entities mentioned by the Complainant in her brief. *Id.*

Findings of Fact and Conclusions of Law

I concur with the findings of fact and conclusions of law Judge Stansell-Gamm made in his June 13, 2007, decision, and conclude that his sound reasoning remains applicable in the present claim. *Flezar, supra.* As Judge Stansell-Gamm noted, Section 806 of the Act, 18 U.S.C. § 1514A, and 29 C.F.R. § 1980.102 prohibit a company with either a class of securities registered under § 12 of the SEA of 1934 ("SEA"), 15 U.S.C. § 781, or that is required to file reports under SEA § 15(d), 15 U.S.C. § 78o(d) from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, caused information to be provided, or otherwise assisted in an investigation, regarding any conduct the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

The AMA is a private organization that has not registered securities under Section 12 of the SEA. Additionally, Section 15(d) of SEA relates solely to reports of registered issuers of securities. The AMA is not such an issuer. The Complainant has offered no evidence to rebut that and, in fact, admits she can find no such reports filed with the SEC by the AMA. As a non-profit, non-publicly traded company, the AMA is not subject to Section 806 of SOX. *Paz v. Mary's Center for Maternal & Child Care,* ARB No. 06-031, ALJ No. 2006-SOX-7 (ARB Nov. 30, 2007).

Additionally, the Complainant's broad allegation that the AMA should be subject to SOX because of possible contractual relationships with publically-traded corporations is insufficient to bring the Respondent under the Act. *See Goodman v. Decisive Analytics Corp.*, 2006 SOX 11 (Jan. 10, 2006). After a review of the Complainants many documents, I find no basis for subjecting the AMA to Section 806 of SOX. Consequently, I concur completely with Judge Stansell-Gamm's previous decision that the AMA is not subject to the provisions of Section 806 of SOX and thus not properly named as a Respondent. The AMA is not a publicly traded company and the Complainant is not an employee entitled to SOX whistleblower protection. Accordingly, the Complainant's SOX complaint is dismissed.

ORDER

The Complainant's October 22, 2007, SOX complaint is hereby DISMISSED. SO ORDERED.

A
John M. Vittone
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant

Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
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Issue Date: 13 June 2007

Case No.: 2007 SOX 30

In the Matter of

JANICE FLESZAR,
Complainant,

v.

AMERICAN MEDICAL ASSOCIATION,
Respondent.

Appearances: Ms. Janice M. Fleszar
Pro Se (representing herself)

Mr. Scott E. Gross, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

INITIAL DECISION AND ORDER – DISMISSAL OF COMPLAINT

On February 28, 2007, I was assigned to conduct a hearing and render a decision in this case, concerning Ms. Fleszar's September 29, 2006 complaint,

under § 806 of the Sarbanes-Oxley Act of 2002 ("Act" or "SOX").[1] Based on my review of the complaint's contents on April 17, 2007, I issued a Show Cause Order on whether Ms. Fleszar's September 29, 2006 SOX complaint should be dismissed for failure to state a cause of action since the Respondent is not a properly-named respondent. Both parties responded to the Show Cause Order.

Procedural History

In a letter to the Administrator of the American Medical Association ("AMA") Retirement and Savings Plan, dated September 29, 2006,[2] Ms. Fleszar filed a complaint under the employee protection provisions of SOX. According to Ms. Fleszar, her employer, AMA, discriminated against her because of her efforts starting in 2003 to report "possible illegal practices and exercise [her] rights under the law as they relate to the Employee Retirement Income Securities Act (ERISA) . . . and the Family and Medical Leave Act." Since 2003, Ms. Fleszar has been informing AMA's human resources department ("HR") about "employment concerns and adverse actions such as retaliation, fraud, discrimination, and harassment."

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[1] Public Law 107-204, 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980.

[2] This letter was copied to Shirley Liu, Benefits Advisor, U.S. Department of Labor, Benefits and Security Administration.

On January 22, 2007, the Regional Administrator dismissed Ms. Fleszar's complaint because AMA was not a company subject to SOX. On February 26, 2007, Ms. Fleszar requested a hearing before the Office of Administrative Law Judges.

Parties' Positions

Ms. Fleszar

In her February 26, 2007 appeal of OSHA's dismissal of her complaint, Ms. Fleszar asserts the AMA is subject to the SOX whistleblower provisions because it has filed several, specific reports with the U.S. Securities and Exchange Commission ("SEC") concerning its defined benefit retirement plan. Additionally, the AMA entered into various arrangements with publicly traded companies, engaged in a mutual fund business, participated in real estate deals, and leased facilities to the federal government.

In response to the Show Cause Order, Ms. Fleszar asserts that since the AMA has filed numerous reports pursuant to § 15(d) of the Securities Exchange Act ("SEA"), the AMA is specifically subject to the whistleblower protection provisions under SOX. Additionally, under *Morefield v. Exelon Serv., Inc.*, 2004 SOX 2 (ALJ Jan. 28, 2004), SOX coverage extends to the AMA because it routinely contracts with publicly traded companies. In support of her complaint, Ms. Fleszar attached a 1980 defined benefits plan filing submitted by the AMA to the SEC.

AMA

Ms. Fleszar's SOX complaint should be dismissed for several reasons. First, the AMA is a private, not-for-profit corporation and not a publicly traded company. Further, the AMA has neither issued any securities under § 12 nor filed any report under § 15(d) of the SEA.[3] As a result, the AMA is not subject to the whistleblower protection provisions of § 806 of the Act. Second, although the AMA may have filed reports with the SEC related to its retirement program, those filings do not subject the AMA to § 806 because that provision specifically limits its applicability to companies who file reports *under 15(d)*. Third, the AMA's contracts with publicly traded companies does not subject the AMA to the § 806 provision unless it has acted on behalf of the publicly traded company. Fourth AMA's ventures into mutual funds, real estate, and government leases do not place the organization under § 806.

In a response brief, the AMA noted the 1980 ERISA filing submitted by Ms. Fleszar does not involve any past or current AMA-issued securities. Additionally, the cover page for the filing specifically indicates that the AMA does not have any securities registered under § 12(b) and is not required to make any § 15(d) filings. Further, *Morefield* is not applicable because the AMA is not a wholly owned subsidiary

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[3] An affidavit by AMA's Division Counsel supports this assertion.

of a publicly traded company. Similarly, AMA's contacts and contracts with companies covered by SOX does not subject the AMA to § 806.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 806 of the Act, 18 U.S.C. § 1514A(a), and 29 C.F.R. § 1980.102 prohibit a company with either a class of securities registered under § 12 of the SEA of 1934 ("SEA"), 15 U.S.C. § 781, or that is required to file reports under SEA § 15(d), 15 U.S.C. § 78o(d)[4] from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, caused information to be provided, or otherwise assisted in an investigation, regarding any conduct the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

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[4] This provision imposes additional filing requirements on *registered issuers of securities* as determined by the SEC.

As established by the parties' pleadings, the AMA is a private organization that has not registered securities under § 12 of the SEA. Similarly, § 15(d) relates solely to reports of registered issuers of securities, and the AMA is not such an issuer.[5] Consequently, I find the AMA does not fall under either specific category of publicly traded company subject to the § 806 whistleblower provisions.[6]

Concerning the other alleged bases for § 806 coverage, I conclude the AMA's contractual relationships with publicly traded companies, standing alone, are insufficient to make the Respondent a covered employer under the whistleblower protection provisions. *See Goodman v. Decisive Analytics Corp.*, 2006 SOX 11 (Jan. 10, 2006). Likewise, the Respondent's contractual relationships with governmental entities do not subject the AMA to § 806 prohibitions. *See Judith v. Magnolia Plumbing Co.*, 2005 SOX 99, 2005 SOX 100 (ALJ Sept. 20, 2005). Finally, I find no basis

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[5] In her response to the Show Cause Order, Ms. Fleszar alleges the AMA has filed reports under § 15(d). However, in her more specific pleading contained in her request for a hearing, Ms. Fleszar identified various reports by number that the AMA submitted to the SEC and indicated the filings related to its defined benefits plan. Since those reports related to a defined benefits plan and did not involve the issuance of securities, they would not have been filed under § 15(d).

[6] *See Stevenson v. Neighborhood House Charter School*, 2005 SOX 87 (ALJ Sept. 5, 2005) (a company's ERISA requirement to file retirement plan documents with the SEC was insufficient to trigger SOX coverage).

for holding the AMA subject to § 806 provision due to real estate transactions or mutual fund activities.

Based on the above determinations, I find the AMA is not subject to the provisions of § 806 of the Act and thus not a properly named Respondent. As a result, Ms. Fleszar's complaint fails to state a cause of action. Since the AMA was not a publicly traded company, Ms. Fleszar also was not employee entitled to SOX whistleblower protection under 18 U.S.C. §1514A(a) and has failed to establish subject matter jurisdiction. Accordingly, Ms. Fleszar's SOX complaint must be dismissed.

ORDER

The September 29, 2006 SOX complaint of Ms. Janice M. Fleszar is **DISMISSED**.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: June 13, 2007
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ***ten (10) business days*** of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution

Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

United States Court of Appeals
for the Seventh Circuit

Janice M. Fleszar, *Petitioner*	] Petition for Review of
v.	] an Agency/Board Order:
U.S. Department of Labor Administrative Review Board, *Respondent*	] ARB Case Nos. 07-091] and 08-061, ALJ Case] Nos. 2007-SOX-030] and 2008-SOX-16

Janice M. Fleszar hereby petitions the court for review of the Order of the United States Department of Labor ("DOL") Administrative Review Board ("ARB") to dismiss the Final Decision and Order of *Janice M. Fleszar v. American Medical Association* in ARB Case Nos. 07-091 and 08-061, ALJ Case Nos. 2007-SOX-030 and 2008-SOX-16 on March 31, 2009.

Ms. Fleszar believes the ARB, in accordance with its policies and standards and the established duties of Administrative Law Judges, did not fairly adjudicate this case as evidenced by similar proceedings involving whistleblower complaints and employee protection under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("the Act" or "SOX"). She further believes that her inability to secure private counsel has giving rise to prejudice and a denial of her due process rights. This sentiment is predicated on the following:

- The ARB violated regulatory policy requiring decisions to be rendered within 180 days

(Exhibit A). A final decision in *Janice M Fleszar v. American Medical Association* ("AMA") took approximately 292 days, yet there was no evidence of time-consuming investigations, subpoenas for agency/company reports and other documentation or depositions that might justify such a delay. This set timeframe was established by law to prevent undue hardship for the complainant.

- According to The Employment Law Group, representative counsel for the complainant in *Kalkunte v. DVI Financial Services Inc*, "In affirming the ALJ's decision, the ARB held that *a company cannot escape liability for violating the whistleblower provisions of SOX merely because it is not registered under the SEC or required to file reports under the same act.*" In this landmark decision by the DOL, a private company was liable for retaliation and ordered to pay damages. The decision came down on February 27, 2009, a month earlier than the decision in *Fleszar v. American Medical Association*. This is significant in that Appeals Judge Wayne C. Beyer presided in both cases. In Ms. Fleszar's case, however, his tenor, discussion, and decision-making was remarkably different and showed significant disparity.

  For example, the ARB characterized Ms. Fleszar's argument and evidence as "a murky pond of material, much related putative merits of her claim and now asks us to fish for her legal theory on SOX coverage."

She found these comments subjective, inaccurate, and insulting.

- Ms. Fleszar's claims of retaliatory treatment were not discussed by the ARB or ALJ for that matter, despite the illegality of taking adverse action against an employee (especially one of 25 years) for reporting fraud and other wrongdoing to her employer's senior management and the DOL. Under whistleblower law, Ms. Fleszar believes she merited protection regardless of her ability to succeed under SOX.

- While Ms. Fleszar implored the ARB and ALJ to conduct an investigation based on evidence-based claims, well founded suppositions, and documented patterns of disreputable corporate behavior, the issue was never addressed. The same held true for her request for counsel.

- The ARB made no reference to consulting with the U.S. Securities and Exchange Commission or demonstrated knowledge regarding securities law and related matters. It took AMA at its word, despite evidence of fraud and other wrongdoing over time. There was no indication the ARB requested documents to validate AMA's claims about the dissolution of AMA Investment Advisors or its relationship with Oppenheimer, its affiliates or other public companies.

- The ARB did not address AMA's non-compliance with Ms. Fleszar's 401(k) loan promissory note involving the sale of securities or AMA's

questionable "match fund" credit practices for 401(k) loan repayment [and recent 401(k) pension distributions] with Fidelity Investments, a public company. Even a timely request (June 28, 2007) for guidance from the SEC by both Fidelity Investments and Oppenheimer regarding net asset value and tax liability associated with payment or reimbursement of funds when an advisor or other party has made errors, did not generate any interest to probe further.

- The focus of SOX has been on public companies because of their ability to affect the stock market and shareholders. Yet, the ARB declined to consider that AMA operations have a similar capacity through its subsidiaries, business affiliations/ partnerships, and investments as well as through the sale and promotion of products and services (i.e. electronic medical record systems, stock funds, physician prescribing data). Perhaps the most profitable and influential of all is the Current Procedural Terminology (CPT®) product the most widely accepted and used medical nomenclature to report medical procedures and services under public and private health insurance programs including Medicare and Medicaid for payment purposes. One also cannot discount the AMA's power of influence through it lobbying activities involving public companies such as pharmaceuticals.

  Costly expenditures for such ventures and activities affect an organization's bottom line

> and no doubt contributed to AMA's decision to freeze its employee defined benefit pension plan in 2002. This decision adversely affected many long term, "invested" employees (aka shareholders) who counted on their investment in this plan for their future security. It has been reported that companies are permitted to freeze their defined benefit pension plan only if their financial viability is at risk. Ms. Fleszar does not recall any such circumstance for the AMA because it has consistently reported operating "in the black" before and after 2002.

To substantiate her assertions, Ms. Fleszar has submitted all relevant briefs submitted by the complainant (Exhibit B), the respondent (Exhibit C), and the ARB/ALJ (Exhibit D). She has also provided background on the intent of SOX below. Ms. Fleszar does not wish to burden the court with this information; rather, she believes it important to justifying her claims and petition for review and believes it will be helpful in the deliberations.

Intent of the law

The following is attributed to *Whistleblower Law: A Guide to Legal Protections for Corporate Employees*[1].

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[1] Kohn, Stephen M; Kohn, Michael D; Colapinto, David K. (2004). *Whistleblower Law: A Guide to Legal Protections for Corporate Employees*. Praeger Publishers. ISBN 0-275-98127-4.

SOX was drafted as Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 to counter a corporate culture that punishes whistleblowers. The law sought to "encourage and protect" employees who disclosed fraudulent activity – more specifically, employees of publically traded companies who reported wrongdoing to safeguard investors.

With unprecedented numbers of Americans who invest in these companies and depend on their honesty, whistleblowers are viewed as serving the public good. The Senate indeed recognized the value of these corporate insiders as key witnesses and the need for their encouragement in reporting fraud, especially in the wake of Enron.

Beginning in 1972, Congress gave the U.S. Department of Labor (DOL) jurisdiction in adjudicating whistleblower claims under environmental, energy, and safety laws. It established a four-part mechanism to protect whistleblowers including: "1) OSHA would conduct a preliminary investigation into the merits of a case and issue preliminary findings; 2) The parties would be entitled to a de novo review of their claims before the DOL Administrative Law Judge (ALJ) and afforded discovery and a full on-the-record public hearing; 3) The ALJ's ruling would be subject to an appeal within the DOL [Administrative Review Board (ARB)] to adjudicate these appeals; and 4) Any party could seek judicial review of a final order of the DOL by the U.S. Court of Appeals for the circuit in which the violation of the law occurred."

Under SOX, it is unlawful for employers to retaliate against employees who lawfully act to disclose information to detect and stop fraud. This statute also employs a "reasonable belief" test, which states:

> [A]n employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection under [the whistleblower law] for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agency

The law also requires application of the "contributing factor" test for controlling legal analysis in evaluating the merits of corporate whistleblower claims. Unique to SOX are the following provisions:

> To ensure that wrongfully discharged employees would not be prejudiced by the delays frequently found in civil court proceedings, Congress authorized *the DOL to immediately require the reinstatement of any employee it determined was wrongfully fired, even before the parties had their claims heard before a judge*. In addition, employees were provided the right to re-file their claims in federal district court if they exhausted their administrative remedies within the DOL and if the DOL did not issue a final order within 180 days absent "bad faith" conduct to delay the DOL proceeding. The law sought to ensure that SOX whistleblower cases were adjudicated in a fair and timely manner, and based

> on Congressional history regarding explanations of the law and actual language, "narrow" or "hyper-technical" interpretation of whistleblower laws, such as SOX, "will do little to effect" the statute's remedial purposes. It has been reported that courts recognize that whistle-blowing "may expose not just private harms" but "hazards to the public." As such, the DOL adopted a position that whistleblower cases "do not simply provide a forum for private parties to litigate their private employment discrimination suits," but has an obligation to represent the "public interest."

Congress by all intent and purposes set out to "refashion the regulatory and private sector environments which failed to detect or affirmatively allowed deception in reporting of corporate value and performance and permitted the type of shenanigans which brought several large concerns down in ruins. To prevent the recurrence of such chicanery in the future, it examined the ethical standards and accounting and reporting systems flaws and failures which, in some instances, allowed fraud to flourish." Consequently, a pinched view of such endeavors was not thought to serve the purposes or policies of the Act.

Ms. Fleszar thanks the court for its consideration of this "Petition for Review" and, in view of her lack of legal acumen as a pro se petitioner (at this time), she

humbly asks for your indulgence in assessing the merits of her case.

Respectfully,

/s/ Janice M. Fleszar

Attorney: Pro Se for

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